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No. 00-38

IN THE

Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Petitioners,

v.

KIM HO MA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS WATCH, HUMAN RIGHTS ADVOCATES, ET AL. IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTEREST OF THE AMICI CURIAE[1]

This brief is respectfully submitted jointly by Human Rights Watch, Human Rights Advocates, Center for Constitutional Rights, Jesuit Refugee Service, International Human Rights Law Clinic at Boalt Hall, U.C. Berkeley, Center for Human Rights & Justice, International Human Rights Law Group, World Organization Against Torture USA, and the Extradition and Human Rights Committee of the American Branch of the International Law Association in support of the Respondent Kim Ho Ma ("Ma").[2] Both parties have consented to the filing of this brief.

Amici are organizations that seek to protect the human rights of all persons, including persons held in detention by the Immigration and Naturalization Service ("INS"). Consistent with U.S. law and practice, *Amici* support the application of established international human rights norms in the United States.

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1 Pursuant to Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae or its counsel*.

SUMMARY OF ARGUMENT

This brief is filed in support of Ma's argument that he may not be detained indefinitely without charge or trial simply because no other country will accept him. Ma is not serving a criminal sentence nor has he been charged with a crime for which he is being detained. *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000). While the United States is attempting to negotiate a repatriation agreement with Cambodia, there is no reason to believe that Ma's deportation is imminent or even likely in the reasonably foreseeable future. Ma's detention, therefore, violates the universally accepted prohibition against arbitrary detention.

It is a well-known doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. Accordingly, U.S. courts have demanded a clear expression of intent before they will conclude that Congress intended to supercede international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the international prohibition against arbitrary detention. Indeed, it can reasonably be interpreted to not authorize such detention. Therefore, the Ninth Circuit was correct when it refused to interpret 8 U.S.C. § 1231(a) as authorizing indefinite detention.

ARGUMENT

I.
MA'S DETENTION CONSTITUTES ARBITRARY DETENTION IN VIOLATION OF INTERNATIONAL LAW

Petitioners have argued that Ma should be detained pursuant to the legal fiction that his detention is reasonable and merely temporary – Ma's detention will cease once deportation has been effectuated. Before Ma was ordered released by the District Court, the INS continued to detain him even though the Government of Cambodia had refused all requests to provide travel documents for him. There is currently no repatriation agreement between the United States and Cambodia. Although the United States continues in its efforts to negotiate with Cambodia, it is unclear whether these negotiations will ever succeed. Ma's detention will continue as long as the United States and Cambodia are unable to resolve their differences. Accordingly, Ma could be detained for years. By the standards of national and international law, Ma has been subjected to arbitrary detention.

Few concepts are more fundamental to ordered liberty than the right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge. This basic principle of human rights can be traced to the seminal document on personal liberty and civil governance – the *Magna Carta*. Drafted in 1215 to check the abuse of power manifested

by the English monarchy, the *Magna Carta* proclaimed that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[3] Since its affirmation in the Magna Carta, the prohibition on arbitrary detention has limited the unfettered power of governments to detain individuals. It has been affirmed in national constitutions throughout the world, including the *United States Constitution. U.S. Const. amend. V.* Equally significant, it has been recognized by virtually every multilateral and regional human rights instrument of the twentieth century.[4]

The Universal Declaration of Human Rights is the most well-recognized and respected elaboration of international human rights norms of the twentieth century. Universal Declaration of Human Rights, G.A.

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3. As noted by Blackstone in his *Commentaries on the Laws of England*, this provision alone merited the title of the Great Charter. William Blackstone, IV *Commentaries on the Laws of England* 424 (photo reprint. 1978) (1783).

4. U.S. courts consult a variety of sources to determine the status of international law, including multilateral and regional agreements, decisions of national and international tribunals, statements of international organizations, the recorded expertise of jurists and commentators, and other sources reflecting the approval of the international community. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

Res. 217A (III), U.N. Doc. A/810 at 71 (1948). While the Universal Declaration is not a treaty obligation, it is recognized to embody the rules of international law in the realm of human rights. *See generally* Jordan Paust, *International Law as Law of the United States* 246 (1996). Article 9 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." According to the *travaux préparatoires*, the term "arbitrary" was added for both practical and historical reasons - the "legal" atrocities perpetrated by Nazi Germany were of too recent origin to permit the acceptance of a provision that would allow governments to detain individuals unjustly. Even an arrest or detention implemented pursuant to an existing law could be categorized as "arbitrary" if it was unjust.[5] Accordingly, the prohibition against arbitrary detention is meant to protect individuals against both illegal and unjust laws.[6] *See generally* Parvez Hassan,

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5. During the drafting of the Universal Declaration, a delegate from the United Kingdom indicated that "[t]he article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." 3 GAOR, Pt. I, Third Comm. 247, 248 (1948).

6. *Arbitrary Arrest, Detention and Exile* 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." Id.

The Word "Arbitrary" As Used in the Universal Declaration of Human Rights: "Illegal" Or "Unjust?" 10 *Harvard International Law Journal* 225 (1969).

The International Covenant on Civil and Political Rights ("Covenant on Civil and Political Rights"), adopted in 1966, formally codifies many of the rights set forth in the Universal Declaration of Human Rights.[7] International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The United States ratified the Covenant on Civil and Political Rights in 1992.[8] Article 9(1) provides that "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." According to the *travaux préparatoires*, the term "arbitrary" means far more than "illegal." Deprivations of liberty provided for by law must not be manifestly disproportionate, unjust, or

7. As of January 1, 2000, there are 144 States Parties to the Covenant on Civil and Political Rights.

8. In December 1998, President Clinton forcefully reasserted the U.S. commitment to the Covenant by issuing Executive Order, No. 13107, 63 FR 68991 (Dec. 10, 1998). According to Section 1(a) of the Executive Order, "[i]t shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [Covenant on Civil and Political Rights] . . . ."

unpredictable.[9]

The Human Rights Committee, established to monitor compliance with the Covenant on Civil and Political Rights, has stated that Article 9 is applicable to all deprivations of liberty. Human Rights Committee, General Comment No. 8 (1982). Furthermore, the Human Rights Committee has indicated that "arbitrariness" is not meant to be equated exclusively with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, or disregard for due process of law. *Womah Mukong v. Cameroon*, Communication No. 458/1991 (10 August 1994), U.N. Doc. CCPR/C/51/D/458/1991). In numerous cases, the Human Rights Committee has found that states committed arbitrary detention by detaining individuals who had already served and completed their prison terms. In *Ana Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977 (3 April 1980), U.N. Doc. CCPR/C/OP/1 at 45 (1984), for example, the Human Rights Committee found that Uruguay violated Article 9(1) when it detained two individuals for several months after their original prison sentences had been fully served. *See also Nqalula Mpandanjila et al. v. Zaire*,

9. According to Manfred Nowak, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993).

Communication No. 138/1983 (26 March 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 121 (1986).

Several other human rights bodies have affirmed the prohibition against arbitrary detention. For example, the Working Group on Arbitrary Detention was established by the United Nations in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards, including Article 9 of the Covenant on Civil and Political Rights. *See* U.N. Commission on Human Rights Res. 1991/42. The Working Group has indicated that cases where individuals are kept in detention after their sentences are completed constitutes arbitrary detention. *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997). The Working Group is particularly aware of the unique situation faced by immigrants and asylum seekers that are held in prolonged administrative custody. Accordingly, the Working Group has identified a series of principles to govern the detention of immigrants and asylum seekers. *Report of the Working Group on Arbitrary Detention,* U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999). In particular, Principle 6 provides that the decision to detain an immigrant or asylum-seeker "must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law." Principle 7 adds that "[a] maximum period should be set by law and the custody may in no case be unlimited or of

excessive length."[10] *See also Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1999/63 (Dec. 18, 1998) (Immigrants and asylum seekers are "[n]ot to be held in custody for an excessive or unlimited period, with a maximum period being set, as appropriate, by the regulations."); *Report of the Working Group on Arbitrary Detention,* U.N. Doc. E/CN.4/1998/44 (Dec. 19, 1997) ("[T]he following issues require to be addressed . . .(b) The need to provide for a limited period of detention, if not already provided by legislation, and the necessity of applying the restrictive period, where provided for, strictly, to ensure that the detention is not prolonged unreasonably.").

In May 1997, the Working Group considered a case of immigration detention in the United States. *Decisions and Opinions Adopted by the Working Group on Arbitrary Detention* U.N. Doc. E/CN.4/1998/44/Add.1 (Nov. 3, 1998). Three Cuban nationals had been detained for over ten years as immigration detainees even though they had not been convicted of a crime. The Working Group determined "that their detention is without any legal basis. It is also in contravention of articles 9 and 10 of the Universal Declaration of Human

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10. In a recent report on the status of immigrants and asylum seekers in the United Kingdom, the Working Group indicated that "[a]n absolute maximum duration for the detention of asylum seekers should be specified in national law." *Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers*, U.N. Doc E/CN.4/1999/63/Add.3 (Dec. 18, 1998).

Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights." Id. Accordingly, the Working Group concluded that the deprivation of liberty was arbitrary. Furthermore, it requested the United States "to take the necessary steps to remedy the situation, and bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights." *Id.*

The United Nations High Commissioner for Refugees ("UNHCR") has also condemned the arbitrary detention of immigrants. Recognizing that refugees are a particularly vulnerable group, the UNHCR has urged states to differentiate refugees from other aliens and, in particular, to not subject refugees to indefinite detention when travel documents cannot be acquired.[11] *See, e.g.*, UNHCR Executive Committee Conclusions Nos. 7 (1977), 44 (1986), and 82 (1997). Indeed, the UNHCR has condemned the arbitrary detention of asylum-seekers, refugees, and other aliens who are stateless or cannot be returned to their countries of origin. Recent UNHCR Guidelines elaborate upon this critical issue.

The inability of statelesspersons who have

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11. By definition, a refugee is an individual who maintains a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social or political group. *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, TIAS No. 6577. It is not surprising that refugees may face difficulties in acquiring travel documents from their countries of origin.

left their country of habitual residence to return to their countries has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

See UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Refugees* (Feb. 10, 1999). These Guidelines especially stipulate that "being stateless and therefore not having a country to which automatic claim might be made for the issuance of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release." *Id.*

The prohibition against arbitrary detention is recognized in each of the regional human rights agreements, which further affirms the universality of this fundamental norm. *See* American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, at art. 7(3) ("No one shall be subject to

arbitrary arrest or imprisonment");[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, at art. 5(1) ("Everyone has the right to liberty and security of the person.");[13] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, at art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.").[14]

The well-regarded European Court of Human Rights has interpreted the prohibition against arbitrary detention as set forth in Article 5(1) of the European Convention quite broadly. According to the European Court, every deprivation of liberty must be lawful.[15]

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12. As of January 1, 2000, there are 26 States Parties to the American Convention on Human Rights. The United States has signed but not ratified the American Convention.

13. As of January 1, 2000, there are 41 States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

14. As of January 1, 2000, there are 52 States Parties to the African Charter on Human and Peoples' Rights.

15. Indeed, the European Court noted in *Soering v. United Kingdom* that excessive, long-term detention may well constitute a violation of the prohibition against torture and inhuman or degrading treatment or punishment. *Soering v. United Kingdom*, 11 E.H.R.R. 439 (1989).

Kemmache v. France, 19 E.H.R.R. 349 (1995). In turn, lawfulness implies conformity with the substantive and procedural rules of domestic law. It also implies the absence of arbitrariness. "In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as lawful." *Id.* at 359. Thus, the purpose of Article 5(1) is to protect individuals from arbitrariness. While Article 5(1)(f) of the European Convention authorizes the detention of individuals for purposes of deportation and extradition, the European Court has placed careful restrictions on this power. In *Quinn v. France*, 21 E.H.R.R. 529 (1996), for example, the European Court stated that detention pending extradition cannot exceed a reasonable time.

> It is clear from the wording of both the French and the English versions of Article 5(1)(f) that deprivation of liberty under this sub-paragraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1). Id. at 550.

The Court determined that detention for a period of 18 months constituted arbitrary detention in violation of Article 5(1).

In its own statements before international tribunals, the United States has argued that arbitrary

detention violates international law. For example, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 42, at para. 91.

In its annual Country Reports on Human Rights Practices, the U.S. Department of State has identified and condemned numerous instances of arbitrary detention throughout the world. In its 1998 report on Turkey, for example, the State Department noted the continuing problem of arbitrary arrest and detention. U.S. Department of State, II *Country Reports on Human Rights Practices for 1998* 1551 (1999). While the Turkish Constitution specifies the right to speedy arraignment and trial, "judges have ordered that a significant number of suspects be detained indefinitely, sometimes for years." Id. Similar findings were noted in numerous other countries, including Bangladesh, Bolivia, Brazil, Egypt, Panama, Paraguay, and Russia.

U.S. courts have repeatedly held that arbitrary

detention violates international law.[16] *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d 689, 717 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988). *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 184-185 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

As noted by the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987) ("*Restatement (Third)*"), "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged, arbitrary detention. . . ." In turn, "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if "it is incompatible with the principles of justice or

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16. Foreign courts have made similar determinations. In *Katrina Marie Akers v. The Minister of State for Immigration, Local Gov't and Ethnic Affairs*, 20 F.C.R. 363 (1988), for example, an American citizen was detained by Australian authorities for several months pending her deportation to the United States. In reviewing the permissibility of her detention, the federal court of Australia for the Western Australia District indicated that "there is a growing recognition in international law that aliens or non-citizens may expect to have access to the same basic civil rights as enjoyed by nationals. The right of liberty is a precious right entitled to protection." *Id.* at para. 31. While Australian immigration law authorized the detention of non-citizens, the right to detain must serve "a limited purpose and no more, namely, for such period as is reasonably required to enable the Minister to consider whether a deportation order should be made." *Id.* at para. 32.

with the dignity of the human person." [citation omitted]." *Id.* at § 702 cmt. (h).

In sum, few international norms are more clear and fundamental than the prohibition against arbitrary detention, which extends to individuals in immigration proceedings. It is codified in the Covenant on Civil and Political Rights, an agreement ratified by the United States, and is well-established under customary international law.

II.

FEDERAL STATUTES MUST BE INTERPRETED IN LIGHT OF INTERNATIONAL LAW

In the present case, the statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the prohibition against arbitrary detention.[17] In the absence of a statute that clearly and unequivocally states an intention to supersede the prohibition against arbitrary detention, this Court should interpret the statute consistent with our Government's obligations under international law.

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17. Indeed, U.S. ratification of the Covenant on Civil and Political Rights, coupled with Executive Order, No. 13107, suggests the contrary – the United States is fully committed to the protection and promotion of human rights and fundamental freedoms.

See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804);*Weinberger v. Rossi*, 456 U.S. 25 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983).

It is a well-known doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible.[18] *Restatement (Third)* § 114. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supercede international law in any of its statutes. *Restatement (Third)* § 115(1)(a). *See also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2nd ed. 1996); Paust, supra, at 107-108. This doctrine does not require courts to use international law as a means for overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

This doctrine of statutory construction has a long history.[19] The Supreme Court's decision in *Talbot v.*

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18. The phrase "where fairly possible" derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute. *See Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936); *Restatement (Third)* § 114 rpt. n. 2.

19. This doctrine is not unique to American jurisprudence. *See Ian Brownlie, Principles of Public International Law* 48-50 (4th ed. 1990). *See also Leroux v. Brown*, 138 Eng. Rep. 1119 (C.P. 1852); *Le Louis*, 165 Eng. Rep. 1464 (Adm. 1817).

Seeman, 5 U.S. 1 (1801) represents, perhaps, the first elaboration of this principle of statutory construction. In *Talbot*, Chief Justice Marshall indicated that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43.

In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. In February 1800, Congress adopted the Non-Intercourse Act to suspend all commercial intercourse between the United States and France. Implementation of the Act was supplemented by instructions issued by the President. In July 1800, Captain Alexander Murray of the U.S. frigate Constellation captured the vessel Charming Betsy as it was bound for the island of Guadalupe, a French dependency. At the time of its capture, the Charming Betsy was owned by Jared Shattuck, a Danish burgher who had been born in the United States. Alleging a violation of the Non-Intercourse Act, Captain Murray confiscated the cargo and the vessel. Both the district court and circuit court declared the seizure illegal. On appeal to the U.S. Supreme Court, the principal issue was whether "the Charming Betsy was subject to seizure and condemnation for having violated a law of the United States?" *Id.* at 118.

Writing for the Supreme Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law.

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. at 118. In light of these principles, Chief Justice Marshall considered whether the Non-Intercourse Act applied to neutral vessels.

> If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words

> placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

Id. at 119. Determining that the Charming Betsy was the bona fide property of a Danish burgher, Chief Justice Marshall concluded that the Charming Betsy was not forfeitable even though it was employed in carrying on trade and commerce with a French island

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Since its elaboration in *Murray v. Schooner Charming Betsy*, this doctrine of statutory construction has been extended to apply to treaties, in addition to customary international law. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Supreme Court considered whether immigration restrictions adopted by Congress pursuant to the Chinese Restriction Act were inconsistent with a treaty entered into between the United States and China. In 1880, the United States and China entered into a treaty which regulated the rights of Chinese nationals to enter and remain in the United States. In 1882, Congress adopted the Chinese Restriction Act, which placed certain restrictions on the entry of "Chinese laborers." The Court had to determine whether Congress intended to violate the "stipulations of a treaty, so recently made with the government of another country." *Id.* at 539. Writing for the Court, Justice Harlan emphasized the importance of treaties and recognized the profound implications that arise when a country violates an international obligation.

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.
> Id. at 540.

Reviewing the treaty language and subsequent federal legislation, Justice Harlan refused to override the treaty absent explicit congressional authorization.

> When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the

> general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer.

Id. at 550.

Throughout its case law, the Supreme Court has emphasized that it will not interpret statutory provisions to conflict with international law, particularly in the absence of clear congressional intent, if any other construction is fairly possible. In *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), the Supreme Court considered whether a 1971 federal statute on employment discrimination superseded two agreements entered into between the United States and the Philippines, the 1947 Military Bases Agreement and the 1968 Base Labor Agreement. Writing for a unanimous Court, Justice Rehnquist reaffirmed the *Charming Betsy* doctrine.[20] Id. at 32. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required . . . ." *Id.* Reviewing the legislative history of

20. Justice Rehnquist did not distinguish between treaties and executive agreements for purposes of applying this doctrine of statutory construction.

the affected statute, Justice Rehnquist found no "support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at Unites States military bases overseas." Id. at 33. Accordingly, Justice Rehnquist concluded that the international agreements were not superseded by the subsequent federal legislation.

In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), the Supreme Court considered whether Congress had sought to override the provisions of the Warsaw Convention regulating international air travel by adopting the Par Value Modification Acts. Writing for the Court in an 8-1 ruling, Justice O'Connor indicated that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." Id. at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Acts.[21]

21. While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of the *Charming Betsy* doctrine. Indeed, Justice Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 263 (Stevens, J. dissenting). *See*

"Legislative silence is not sufficient to abrogate a treaty. [citation omitted] Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention." Id. Accordingly, Justice O'Connor concluded that the treaty provisions remained enforceable in United States courts.

In one of the most recent elaborations of the *Charming Betsy* doctrine issued by the Supreme Court, Justice Scalia, joined by Justices O'Connor, Kennedy, and Thomas, reaffirmed the validity of this doctrine of statutory construction. *In Hartford Fire Insurance Co., v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting), the Supreme Court considered the extraterritorial reach of the Sherman Act. While the majority opinion did not address the *Charming Betsy* doctrine, Justice Scalia acknowledged and affirmed the relevance of this doctrine of statutory construction in his dissenting opinion.

It is relevant to determining the

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also Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

> substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. [citation omitted] Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international law limits on jurisdiction to prescribe.

Id. at 815. Accordingly, Justice Scalia indicated that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Id

While this doctrine of statutory construction is steeped in the principle of comity, it is also influenced by foreign policy concerns. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Supreme Court applied this doctrine to avoid negative foreign policy implications. Specifically, the Court refused to construe the National Labor Relations Act in a manner contrary to State Department regulations because such a construction would have foreign policy implications. The Court also relied on the fact that the proposed construction would have been contrary to a "well-established rule of international law." Id. at 21. *See also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

Finally, the *Charming Betsy* doctrine is guided by separation of powers concerns. It respects the constitutional roles of the Executive and Legislative branches of government in formulating foreign policy. It acknowledges the institutional capacity of the coordinate branches to indicate whether they seek to violate international law. Accordingly, courts will not question the commitment of the Executive and Legislative branches of government to international law unless such intent is clearly manifest in federal law. *Chew Heong v. United States*, 112 U.S. at 540. When faced with ambiguous statutes, the division of power among the federal branches is best served by interpreting such statutes so as not to violate international law.

This doctrine of statutory construction is not an historical anomaly or isolated extrapolation – it is a longstanding doctrine of statutory construction that has been affirmed by the U.S. Supreme Court in numerous decisions.[22] *See also Sale v. Haitian Centers Council, Inc.*,

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22. Significantly, the *Charming Betsy* also forms the basis of the constitutional avoidance doctrine of statutory construction.

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. [citation omitted] This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy* [citation omitted], and has for so long been applied by this Court that it is beyond debate.
>
> *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988). *See also* Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 *New York University Journal of International Law and Policy* 35, 38 (1997). This doctrine of statutory construction was also used by the Ninth Circuit in *Ma v. Reno*, 208 F.3d at 822.

509 U.S. 155 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-449 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Brown v. United States*, 12 U.S. 110, 125 (1814).[23] It is based upon comity, a respect for other nations, and the law which binds the international community. It is influenced by the reality that violations of international law, unlike violations of purely domestic law, may have profound foreign policy

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23. Lower courts have also applied this canon of statutory construction on countless occasions. See, e.g., Cheung v. United States, 213 F.3d 82 (2nd Cir. 2000); Mojica v. Reno, 970 F. Supp. 147-152 (E.D.N.Y. 1997)Mojica v. Reno, 970 F. Supp. 147-152 (E.D.N.Y. 1997); United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982).

consequences. Finally, the Charming Betsy doctrine is guided by separation of powers concerns. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect U.S. compliance with its international obligations.

The statute under which Ma is being held, 8 U.S.C. § 1231(a), does not explicitly authorize the indefinite detention of a deportable alien who cannot be removed in the reasonably foreseeable future. Moreover, the statute contains no clear statement purporting to violate the international prohibition against arbitrary detention. Indeed, it can reasonably be interpreted to not authorize such detention. Accordingly, the Ninth Circuit's refusal to interpret 8 U.S.C. § 1231(a) as authorizing indefinite detention is consistent with long-standing practice.

CONCLUSION

For these reasons, *Amici* respectfully submit this brief and urge the Court to affirm the Ninth Circuit's ruling.

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APPENDIX

APPENDIX

STATEMENTS OF AMICI

Human Rights Watch is a non-profit organization that investigates and reports violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. Since its inception, it has taken a particular interest in advocacy on behalf of vulnerable groups including refugees, asylum seekers, migrants, the stateless, and the internally displaced. Human Rights Watch maintains a program dedicated specifically to research and advocacy on behalf of refugees and similarly situated persons, and has documented detention-related violations of their fundamental human rights in many countries, including the United States.

Human Rights Advocates is a non-profit California organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus curiae* before a number of U.S. courts, including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth

Circuits, and the California Supreme Court. Human Rights Advocates has also appeared before international fora including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The *Center for Constitutional Rights* ("CCR") is a legal and educational organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. A major focus of CCR's work is the protection of international human rights. CCR has successfully litigated many important international human rights cases, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). CCR has also presented international human rights claims in such fora as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United Nations Commission on Human Rights, and the Inter-American Commission on Human Rights. Another major focus of CCR's work is the protection of the constitutional rights of refugees and immigrants.

The *Jesuit Refugee Service* ("JRS") was established by the Society of Jesus in 1980 in response to the refugee crisis in Southeast Asia. JRS now works in more than 40 countries providing direct service and advocacy on behalf of refugees and

asylum seekers. JRS gives priority to those refugees who may have been forgotten and where other agencies may not be providing services. In this context, JRS works in several detention facilities in the United States, providing social services and pastoral care to immigration detainees. From this vantage, JRS has seen and understands the implications of detention, particularly indefinite detention, on those facing this uncertain future.

The *International Human Rights Law Clinic* ("Clinic") was founded at Boalt Hall Law School, University of California at Berkeley to educate and train law students about human rights norms and their application in domestic, regional and international fora. To that end, the Clinic engages in advocacy on behalf of individual asylum-seekers and on larger human rights projects to protect the rights of immigrants and other marginalized communities. The proper application of international human rights law, and particularly *jus cogens* norms, is of fundamental concern to our mission.

The *Center for Human Rights & Justice* ("CHRJ") is a collaborative project between the University of Washington School of Law and Seattle University School of Law. The CHRJ is an inter-university clinical program focusing on international human rights law, policy, and advocacy. Our board members have taught, written and advocated extensively on international law, human rights law, and immigration

law. The CHRJ seeks to train students to advocate on behalf of victims of human rights abuses in the United States and abroad. The CHRJ also serves as a versatile and dynamic source of assistance to organizations and individuals in the front lines of the human rights struggle. The CHRJ joins this amicus brief to support international legal norms, protect human rights, and advance the cause of justice.

The *Urban Morgan Institute for Human Rights* is centered at the University of Cincinnati College of Law. The Morgan Institute, founded in 1979, is the oldest of the law-school-based programs focusing upon the study and promotion of human rights law. The Morgan Institute places students with human rights groups around the world. The Institute also submits briefs to international and domestic courts in cases raising significant human rights issues.

The *International Human Rights Law Group* ("Law Group") is a non-profit public interest legal organization engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978, the Law Group provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. The Law Group's goals include the development and promotion of international legal norms, and Law Group advocates work closely with individuals and organizations world-wide to expand the scope of

human rights protections for men and women. To that end, the Law Group has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. The Law Group joins this legal brief to emphasize the international standards that are binding on this Court.

The *World Organization Against Torture USA* ("Organization") is a non-governmental human rights organization dedicated to the prevention of torture and other forms of cruel and inhuman treatment or punishment. Established in 1996, the World Organization Against Torture USA serves as the U.S. affiliate of a worldwide network of more than 200 groups monitoring human rights compliance by their own governments. The Organization monitors and reports on U.S. compliance with international human rights standards, monitors the status and treatment of refugees and asylum seekers in the United States, assists domestic civil rights and social justice groups in the United States in understanding and making more effective use of international human rights standards and mechanisms as they apply to domestic issues and needs, and works to improve human rights monitoring and enforcement mechanisms at the international level

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The *Extradition and Human Rights Committee of the American Branch of the International Law Association* ("Extradition Committee") is comprised of individuals from the academic, public and private

sectors who have extensive experience in the field of international law and, specifically, human rights law.[24] Members of the Extradition Committee have taught subjects such as international law, human rights law, and foreign relations law and have written extensively in these fields. Furthermore, members of the Extradition Committee have participated in human rights litigation throughout the United States. The Extradition Committee has a longstanding interest in the development of international human rights law. It is committed to the international legal order, the rule of law, and the protection of fundamental human rights.

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24. The Extradition and Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The views expressed herein represent only those of the Extradition and Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in this project.